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**ENVIRONMENTAL PROTECTION AGENCY**

**40 CFR Part 261**

**[EPA-R01-RCRA-2012-0447; FRL-9699-4]**

**Hazardous Waste Management System; Identification and Listing of Hazardous Waste; Proposed Exclusion**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule and request for comment.

**SUMMARY:** The EPA (also, "the Agency" or "we" in this preamble) is proposing to grant a petition submitted by International Business Machines Corporation (IBM), in Essex Junction, Vermont to exclude (or "delist") up to 3,150 cubic yards per calendar year of F006 wastewater treatment sludge generated by IBM's Industrial Waste Treatment System from the list of hazardous wastes.

The Agency has tentatively decided to grant the petition based on an evaluation of waste-specific information provided by IBM. This proposed decision, if finalized, would conditionally exclude the petitioned waste from the requirements of hazardous waste regulations under

the Resource Conservation and Recovery Act (RCRA).

This exclusion would be valid only when the wastewater treatment sludge is disposed of in a Subtitle D landfill which is permitted, licensed, or otherwise authorized by a State to manage industrial solid waste.

If finalized, EPA would conclude that IBM's petitioned waste is nonhazardous with respect to the original listing criteria and that there are no other factors which would cause the waste to be hazardous.

**DATES:** Comments must be received on or before **[Insert date 30 days after publication in the FEDERAL REGISTER]**. EPA will stamp comments received after the close of the comment period as late. These late comments may not be considered in formulating a final decision. Any person may request a hearing on the proposed decision by filing a request to EPA by **[Insert date 15 days after publication in the FEDERAL REGISTER]**. The request must contain the information prescribed in 40 CFR 260.20(d).

**ADDRESSES:** Submit your comments, identified by Docket ID No. EPA-R01-RCRA-2012-0447 by one of the following methods:

1. *www.regulations.gov*: Follow the on-line instructions for submitting comments.

2. E-mail: [leitch.sharon@epa.gov](mailto:leitch.sharon@epa.gov).
3. Fax: (617) 918-0647, to the attention of Sharon Leitch.
4. Mail: Sharon Leitch, RCRA Waste Management and UST Section, Office of Site Remediation and Restoration (OSRR07-1), US EPA Region 1, 5 Post Office Square, Suite 100, Boston, MA 02109-3912.
5. Hand Delivery: Sharon Leitch, RCRA Waste Management and UST Section, Office of Site Remediation and Restoration (OSRR07-1), US EPA Region 1, 5 Post Office Square, 7<sup>th</sup> floor, Boston, MA 02109-3912. Such deliveries are only accepted during normal hours of operation, and special arrangements should be made for deliveries of boxed information. Please contact Sharon Leitch at (617) 918-1647.

*Instructions:* Direct your comments to Docket ID No. EPA-R01-RCRA-2012-0447. EPA's policy is that all comments received will be included in the public docket without change and may be made available online at [www.regulations.gov](http://www.regulations.gov), including any personal information provided, unless the comment includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do

not submit through [www.regulations.gov](http://www.regulations.gov) or e-mail information that you consider to be CBI or otherwise protected. The [www.regulations.gov](http://www.regulations.gov) website is an "anonymous access" system, which means EPA will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail comment directly to EPA without going through [www.regulations.gov](http://www.regulations.gov), your e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, EPA recommends that you include your name and other contact information in the body of your comment and with any disk or CD-ROM you submit. If EPA cannot read your comment due to technical difficulties and cannot contact you for clarification, EPA may not be able to consider your comment. Electronic files should avoid the use of special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* All documents in the docket are listed in the [www.regulations.gov](http://www.regulations.gov) index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, will

be publicly available only in hard copy form. Publicly available docket materials are available either electronically through [www.regulations.gov](http://www.regulations.gov) or in hard copy at the EPA Region 1 Library, 5 Post Office Square, 1<sup>st</sup> floor, Boston, MA 02109-3912; by appointment only; tel: (617) 918-1990.

**FOR FURTHER INFORMATION CONTACT:** Sharon Leitch, RCRA Waste Management and UST Section, Office of Site Remediation and Restoration, (Mail Code: OSRR07-1), EPA Region 1, 5 Post Office Square, Suite 100, Boston, MA 02109-3912; telephone number: (617)918-1647; fax number (617)918-0647; e-mail address: [leitch.sharon@epa.gov](mailto:leitch.sharon@epa.gov)

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##### **I. Overview Information**

The EPA is proposing to grant a petition submitted by International Business Machines Corporation (IBM) located in Essex Junction, Vermont to exclude or delist an annual volume of 3,150 cubic yards of F006 wastewater treatment

sludge from the lists of hazardous waste set forth in Title 40 of the Code of Federal Regulations (40 CFR) 261.31. IBM claims that the petitioned waste does not meet the criteria for which EPA listed it, and that there are no additional constituents or factors which could cause the waste to be hazardous.

Based on the EPA's evaluation described in section III, in which we reviewed the description of the process which generates the waste and the analytical data submitted by IBM, we agree with the petitioner that the waste is nonhazardous. We believe that the petitioned waste does not meet the criteria for which the waste was listed, and that there are no other factors which might cause the waste to be hazardous.

## **II. Background**

### **A. What is a listed waste?**

The EPA published an amended list of hazardous wastes from nonspecific and specific sources on January 16, 1981, as part of its final and interim final regulations implementing § 3001 of Resource Conservation and Recovery Act (RCRA). The EPA has amended this list several times and

publishes it in 40 CFR 261.31 and 261.32.

We list these wastes as hazardous because: (1) they typically and frequently exhibit one or more of the characteristics of hazardous wastes identified in subpart C of part 261 (that is, ignitability, corrosivity, reactivity, and toxicity) or (2) they meet the criteria for listing contained in § 261.11(a)(2) or (3).

B. What is a delisting petition?

Individual waste streams may vary depending on raw materials, industrial processes, and other factors. Thus, while a waste described in the regulations generally is hazardous, a specific waste from an individual facility meeting the listing description may not be.

The procedure to exclude or delist a waste in 40 CFR 260.20 and 260.22 allows a person, or a facility, to submit a petition to the EPA or to an authorized state demonstrating that a specific waste from a particular generating facility is not hazardous.

In a delisting petition, the petitioner must show that a waste does not meet any of the criteria for listed wastes in 40 CFR 261.11 and that the waste does not exhibit any of the hazardous waste characteristics of ignitability,



reactivity, corrosivity, or toxicity. The petitioner must present sufficient information for the Agency to decide whether any factors in addition to those for which the waste was listed warrant retaining it as a hazardous waste. (See § 260.22, 42 United States Code - U.S.C. - § 6921(f) and the background documents for the listed wastes.)

If a delisting petition is granted, the generator remains obligated under RCRA to confirm that the waste remains nonhazardous.

C. What factors must EPA consider in deciding whether to grant a delisting petition?

In reviewing this petition, we considered the original listing criteria and the additional factors required by the Hazardous and Solid Waste Amendments of 1984 (HSWA). See § 222 of HSWA, 42 U.S.C. § 6921(f), and 40 CFR 260.22(d)(2)-(4). We evaluated the petitioned waste against the listing criteria and factors cited in § 261.11(a)(2) and (3).

Besides considering the criteria in 40 CFR 260.22(a), 261.11(a)(2) and (3), 42 U.S.C. § 6921(f), and in the background documents for the listed wastes, EPA must consider any factors (including additional constituents),

other than those for which we listed the waste, if these additional factors could cause the waste to be hazardous.

Our tentative decision to delist waste from IBM's facility is based on our evaluation of the waste for factors or criteria which could cause the waste to be hazardous. These factors included: (1) whether the waste is considered acutely toxic; (2) the toxicity of the constituents; (3) the concentration of the constituents in the waste; (4) the tendency of the constituents to migrate and to bioaccumulate; (5) the persistence in the environment of any constituents once released from the waste; (6) plausible and specific types of management of the petitioned waste; (7) the quantity of waste produced; and (8) waste variability.

EPA must also consider as hazardous wastes, mixtures containing listed hazardous wastes and wastes derived from treating, storing, or disposing of listed hazardous waste. See 40 CFR 261.3(a)(2)(iv) and (c)(2)(i), called the "mixture" and "derived-from" rules, respectively. Mixture and derived-from wastes are also eligible for exclusion but remain hazardous until excluded.

### **III. EPA's Evaluation of the Waste Information and Data**

#### **A. What waste did IBM petition EPA to delist?**

On July 11, 2008, IBM petitioned EPA to exclude from the list of hazardous wastes contained in 40 CFR 261.31, F006 Industrial Waste Treatment Plant (IWTP) sludge generated from its facility located in Essex Junction, Vermont. F006 is defined in § 261.31 as "Wastewater treatment sludges from electroplating operations . . ." IBM claims that the petitioned waste does not meet the criteria for which F006 was listed (i.e., cadmium, hexavalent chromium, nickel and complexed cyanide) and that there are no other factors which would cause the waste to be hazardous. Specifically, the petition request is for a standard exclusion for 3,150 cubic yards per calendar year of WWTP sludge.

B. How does IBM generate the waste?

The sludge IBM generates is from the combination of three separate wastewater treatment processes at the facility. Those processes include: the industrial waste treatment plant (IWTP) process; the biological wastewater treatment plant (BWTP) process; and the chemical mechanical polishing (CMP) microfiltration process. The sludge is primarily sludge from the IWTP, this waste stream receives

discharges from chemical wafer and mask manufacturing cleaning, etching, and stripping, photolithography waste, chemical etching and mechanical polishing, air abatement scrubbers, effluent from the CMP and BWTP treatment systems, wafer rinse, and facility maintenance operations. The industrial wastewaters also include rinse waters from copper electroplating manufacturing operations and wastewaters from acid etching of a thin platinum film and the subsequent rinse step (the copper and platinum wastewaters total less than 0.1 percent of the overall wastewater treated). The biological waste streams include sanitary wastewaters, dilute organic waste (DOW) and concentrated waste (CW). The DOW waste stream receives discharges from chemical wafer cleaning and stripping, Deep Ultra-Violet photolithography waste, air abatement adsorber decant waters, and facility chilled water and boiler maintenance operations. The CW stream consists of waste from semiconductor and mask manufacturing photolithography develop steps, chemical wafer cleaning, etching, and stripping operations, and parts decontamination. The CMP microfiltration waste stream consists of wastewater from chemical/mechanical polishing tools used in semiconductor manufacturing. The CMP wastewaters also include copper sulfate plating bath solutions (totaling less than 0.1 percent of the wastewater

treated through the CMP system). The sludges from these three processes are combined, thickened/conditioned, and pressed to generate the F006 waste stream.

C. How did IBM sample and analyze the petitioned waste?

To support its petition, IBM submitted: (1) Facility information on production processes and waste generation processes; (2) Historical sampling data of the IWTP sludge; (3) Analytical results from four samples for total concentrations for volatiles (SW-846 Method 8260B), semi volatiles (SW-846 Method 8270C) and metals (SW-846 Method 6010B except for mercury - SW-846 Method 7471A and selenium - SW-846 Method 7010), for compounds of concern (COCs); and (4) Analytical results from four samples for Toxicity Characteristic Leaching Procedure (TCLP) extract values for volatiles (SW-846 Method 8260B), semi volatiles (SW-846 Method 8270C) and metals (SW-846 Method 6010B except for mercury - SW-846 Method 7470 and selenium - SM 3113B) for COCs.

IBM generated the sampling data used in the Delisting Risk Assessment Software (DRAS) under a Quality Assurance Project Plan (QAPP) that was approved by EPA, Region 1 on January 27, 2011. Therefore, EPA believes that the sampling

procedures used by IBM satisfy EPA's criteria for collecting representative samples of the F006 waste.

D. What were the results of IBM's analysis of the waste?

EPA believes that IBM's analytical characterization provides a reasonable basis to grant IBM's petition for an exclusion of the wastewater treatment sludge. Furthermore, EPA believes the data submitted in support of the petition show that the sludge is non-hazardous. Analytical data for the wastewater treatment sludge samples were used in the DRAS to develop delisting levels.

The data summaries for the total detected constituents are as follows: (mg/kg) Arsenic - 7.5; Barium - 39; Chromium - 290; Lead - 5.6; Mercury - 0.067; and Nickel - 49. The data summary for the TCLP detected constituents are as follows: (mg/l) Nickel - 0.11 (all other constituents were non-detect). Note that the above levels represent the highest constituent concentration found in any one sample. All analytical data for the volatiles and semi-volatiles samples were non-detect.

E. How did EPA evaluate the risk of delisting this waste?

For this delisting determination, we assumed that the waste would be disposed in a Subtitle D landfill and we considered transport of waste constituents through groundwater, surface water and air. We evaluated IBM's petitioned waste using the Agency's Delisting Risk Assessment Software (DRAS) described in 65 FR 58015 (September 27, 2000), 65 FR 75637 (December 4, 2000), and 73 FR 28768 (May 19, 2008) to predict the maximum allowable concentrations of hazardous constituents that may be released from the petitioned waste after disposal and determined the potential impact of the disposal of IBM's petitioned waste on human health and the environment. To predict the potential for release to groundwater from landfilled wastes and subsequent routes of exposure to a receptor, the DRAS uses dilution attenuation factors derived from EPA's Composite Model for Leachate Migration and Transformation Products (EPACMTP). From a release to groundwater, the DRAS considers routes of exposure to a human receptor of ingestion of contaminated groundwater, inhalation from groundwater while showering and dermal contact from groundwater while bathing.

From a release to surface water by erosion of waste from an open landfill into stormwater run-off, DRAS evaluates the exposure to a human receptor by fish ingestion

and ingestion of drinking water. From a release of waste particles and volatile emissions to air from the surface of an open landfill, DRAS considers routes of exposure of inhalation of volatile constituents, inhalation of particles, and air deposition of particles on residential soil and subsequent ingestion of the contaminated soil by a child. The technical support document and the user's guide to DRAS are included in the docket.

At a target cancer risk of  $1 \times 10^{-5}$  and a target hazard quotient of 1.0, the DRAS program determined maximum allowable concentrations for each constituent in both the waste and the leachate at an annual waste volume of 3,150 cubic yards.

We used the maximum estimated annual waste volume and the maximum reported total and TCLP leachate concentrations as inputs to estimate the constituent concentrations in the groundwater, soil, surface water or air. If, using an appropriate analytical method, a constituent was not detected in any sample, it was considered not to be present in the waste.

F. What did EPA conclude about IBM's waste?



The maximum reported concentrations of the hazardous constituents found in this waste are presented above in section D. The maximum allowable constituent concentrations as determined by the DRAS are as follows: (mg/l) Nickel - 32.4. The maximum allowable constituent concentrations for the remaining constituents are based on the toxicity characteristic in 40 CFR 261 Subpart C: (mg/l) Arsenic - 5.0; Barium - 100.0; Cadmium - 1.0; Chromium - 5.0; Lead - 5.0; and, Mercury - 0.2. The concentrations of all constituents in both the waste and the leachate are below the allowable concentrations. We, therefore, conclude that IBM's wastewater treatment sludge is not a substantial or potential hazard to human health and the environment when disposed of in a Subtitle D landfill.

We, therefore, propose to grant an exclusion for this waste. If this exclusion is finalized, IBM must dispose of this waste in a Subtitle D landfill permitted, licensed or otherwise authorized by a state, and will remain obligated to verify that the waste meets the allowable concentrations set forth here. IBM must also continue to determine whether the waste is identified in subpart C of 40 CFR pursuant to § 261.11(c).

#### **IV. Conditions for Exclusion**

A. When would EPA finalize the proposed delisting exclusion?

HSWA specifically requires the EPA to provide notice and an opportunity for comment before granting or denying a final exclusion. Thus, EPA will not make a final decision or grant an exclusion until it has addressed all timely public comments on today's proposal, including any at public hearings.

Since this rule would reduce the existing requirements for persons generating hazardous wastes, the regulated community does not need a six-month period to come into compliance in accordance with § 3010 of RCRA as amended by HSWA.

B. How will IBM manage the waste if it is delisted?

If the petitioned waste is delisted, IBM must dispose of it in a Subtitle D landfill which is permitted, licensed, or otherwise authorized by a state to manage industrial waste.

C. With what conditions must the petitioner comply?

The petitioner, IBM, must comply with the conditions which will be in 40 CFR Part 261, Appendix IX, Table 1. The text below gives the rationale and details of those requirements.

(1) Delisting Levels:

This paragraph provides the levels of constituents for which IBM must test the WWTP sludge, below which these wastes would be considered non-hazardous. EPA selected the set of constituents specified in paragraph (1) of 40 CFR Part 261, Appendix IX, Table 1, (the exclusion language) based on information in the petition. EPA compiled the constituents list from the composition of the waste, descriptions of IBM's treatment process, previous test data provided for the waste, and the respective health-based levels used in delisting decision-making. These delisting levels correspond to the allowable levels measured in the TCLP concentrations.

(2) Waste Holding and Handling:

The purpose of this paragraph is to ensure that IBM manages and disposes of any WWTP sludge that contains hazardous levels of inorganic and organic constituents according to Subtitle C of RCRA. Managing the WWTP sludge

as a hazardous waste until initial verification testing is performed will protect against improper handling of hazardous material. Unless and until EPA concurs that the initial verification data collected under paragraph (3) supports the data provided in the petition, the exclusion will not cover the petitioned waste. The exclusion is effective upon publication in the Federal Register but the disposal as non-hazardous waste cannot begin until two quarters of verification sampling is completed and an approval is obtained from EPA.

(3) Verification Testing Requirements:

IBM must implement a verification testing program on the WWTP sludge to assure that the sludge does not exceed the maximum levels specified in paragraph (1) of the exclusion language. The first part of the verification testing program is the quarterly testing of representative samples of the WWTP sludge during the first year of waste generation (two quarters prior to obtaining written EPA approval and two additional quarters). The proposed testing would verify that IBM operates a treatment facility where the constituent concentrations of the WWTP sludge do not exhibit unacceptable temporal and spatial levels of toxic constituents. IBM would begin quarterly sampling 30 days after the final exclusion as described in paragraph (3) (A)

of the exclusion language. Consequently this program will ensure that the sludge is evaluated in terms of variation in constituent concentrations in the waste over time.

Following two consecutive quarters of sampling where the levels of constituents do not exceed the levels in paragraph (1), IBM can then manage and dispose of the sludge as non-hazardous in accordance with all applicable solid waste regulations following EPA approval. If EPA determines that the data collected under this paragraph does not support the data provided in the petition, the exclusion will not cover the generated wastes. IBM must then prove through a new demonstration that its waste meets the conditions of the exclusion.

The second part of the verification testing program is the annual testing of representative samples of the WWTP sludge, per paragraph (3)(B) of the exclusion language. To confirm that the characteristics of the waste do not change significantly over time, IBM must continue to analyze a representative sample of the waste on an annual basis. Annual testing requires analyzing the full list of constituents in paragraph (1) of the exclusion language. If operating conditions change as described in paragraph (4) of the exclusion language, IBM must reinstate all testing in paragraph (1) of the exclusion language. IBM must then

prove through a new demonstration that its waste meets the conditions of the exclusion. If the annual testing of the waste does not meet the delisting requirements in paragraph (1), IBM must notify EPA according to the requirements in paragraph (6) of the exclusion language. The facility must provide sampling results that support the rationale that the delisting exclusion should not be withdrawn.

(4) Changes in Operating Conditions:

Paragraph (4) of the exclusion language would allow IBM the flexibility of modifying its processes (for example, changes in equipment or operating conditions). However, if significant changes to the manufacturing or treatment process described in the petition, or the chemicals used in the manufacturing or treatment process are made, then IBM must prove that the modified process(es)/chemicals will not affect the composition or type of waste generated and must request approval from EPA. EPA will determine if these changes will result in additional COCs. IBM must manage wastes generated during the new process demonstration as hazardous waste until it has obtained written approval from EPA and paragraph (3) of the exclusion language is satisfied.

(5) Data Submittals and Recordkeeping:

To provide appropriate documentation that IBM's WWTP

sludge is meeting the delisting levels, IBM must submit reports to EPA as specified in the conditions, and must compile, summarize, and keep delisting records on-site for a minimum of five years. It must keep all analytical data obtained through paragraph (3) of the exclusion language including quality control information for five years.

Paragraph (5) of the exclusion language requires that IBM furnish the data upon request for inspection by any employee or representative of EPA or the State of Vermont.

If the proposed exclusion is made final, it will apply only to 3,150 cubic yards per calendar year of wastewater treatment sludge generated at IBM after successful verification testing.

EPA would require IBM to file a new delisting petition under the following circumstances:

(a) If it generates waste volumes greater than 3,150 cubic yards per calendar year of WWTP sludge. IBM must manage these greater volumes as hazardous unless and until EPA grants a new exclusion.

EPA may review and approve changes in writing or alternatively may require IBM to file a new delisting petition under any of the following circumstances:

(b) If it significantly alters the wastewater treatment process;

(c) If it significantly changes from the current manufacturing process(es) described in the International Business Machines petition; or

(d) If it makes any changes that could affect the composition or type of waste generated such that the changes would cause any of the constituents in paragraph (1) of the exclusion language to potentially be above the delisting levels or would introduce any new constituents into the waste.

(6) Reopener:

The purpose of paragraph (6) of the exclusion language is to require IBM to disclose new or different information related to a condition at the facility or disposal of the waste, if it is pertinent to the delisting. This provision will allow EPA to reevaluate the exclusion, if a source provides new or additional information to EPA. EPA will evaluate the information on which EPA based the decision to see if it is still correct, or if circumstances have changed so that the information is no longer correct or would cause EPA to deny the petition, if presented.

This provision expressly requires IBM to report differing site conditions or assumptions used in the petition in addition to failure to meet the annual testing conditions within 10 days of discovery. If EPA discovers



such information itself or from a third party, it can act on it as appropriate. The language being proposed is similar to those provisions found in RCRA regulations governing no-migration petitions at § 268.6.

EPA believes it has the authority under RCRA and the Administrative Procedures Act (APA), 5 U.S.C. 551 (1978) *et seq.*, to reopen a delisting decision when it receives new information that calls into question the assumptions underlying the delisting. EPA believes a clear statement of its authority in delistings is merited in light of EPA's experience. See Reynolds Metals Company at 62 FR 37694 and 62 FR 63458 where the delisted waste leached at greater concentrations in the environment than the concentrations predicted when conducting the TCLP, thus leading EPA to repeal the delisting. If an immediate threat to human health and the environment presents itself, EPA will continue to address these situations on a case-by-case basis. Where necessary, EPA will make a good cause finding to justify emergency rulemaking. See APA section 553(b).

(7) Notification Requirements:

In order to adequately track wastes that have been delisted, EPA is requiring that IBM provide a one-time written notification to any state regulatory agency through which or to which the delisted waste is being transported.

IBM must provide this notification 60 days before commencing this activity. In addition to providing this notification, IBM is advised to verify with each state the status of EPA's delisting decision under state law (see the discussion in Section V. for specifics).

*D. What happens if IBM violates the terms and conditions of the exclusion?*

If IBM violates the terms and conditions established in the exclusion, the wastes in question would not be exempt from Subtitle C since this is a conditional exclusion, and thus they would be subject to hazardous waste management requirements. EPA also could then initiate procedures to withdraw the exclusion. Where there is an immediate threat to human health and the environment, EPA will evaluate the need for enforcement activities on a case-by-case basis. EPA expects IBM to conduct the appropriate waste analysis and comply with the criteria explained above in paragraph (1) of the exclusion.

**V. How would this action affect the states?**

EPA is issuing this exclusion under the Federal RCRA

delisting program. Thus, upon the exclusion being finalized, the wastes covered will be removed from Subtitle C control under the Federal RCRA program. This will mean, first, that the wastes will be delisted in any State or territory where the EPA is directly administering the RCRA program (e.g., Iowa, Indian Country). However, whether the wastes will be delisted in States which have been authorized to administer the RCRA program will vary depending upon the authorization status of the States and the particular requirements regarding delisted wastes in the various States.

While Vermont has been authorized to generally administer the Federal RCRA program, it has not sought or obtained authorization to delist Federal listed wastes. See 58 Fed. Reg. at 26243 (May 3, 1993). Instead, the Vermont Hazardous Waste Regulation section 7-217(c) specifies that "the Administrator of EPA shall retain the authority to exclude such wastes." By letter dated April 12, 2012, the Vermont Department of Environmental Conservation has confirmed that Vermont interprets this regulation to mean that upon the EPA making a delisting determination (regarding a federally regulated waste), the delisting determination takes effect within that State. Thus, this delisting determination will apply within Vermont with no further action required by the State.

Like Vermont, some other generally authorized States have not received authorization for delisting. Thus, the EPA makes delisting determinations for such States. However, RCRA allows states to impose their own regulatory requirements that are more stringent than EPA's, under § 3009 of RCRA. These more stringent requirements may include a provision that prohibits a federally issued exclusion from taking effect in the state, or that requires a State concurrence before the Federal exclusion takes effect, or that allows the State to add conditions to any Federal exclusion. We urge the petitioner to contact the state regulatory authority in each State to or through which it may wish to ship its wastes to establish the status of its wastes under the state's laws.

EPA has also authorized some states to administer a delisting program in place of the Federal program, that is, to make state delisting decisions. In such states, the state delisting requirements operate in lieu of the Federal delisting requirements. Therefore, this exclusion does not apply in those authorized states unless the state makes the rule part of its authorized program. If IBM transports the federally excluded waste to or manages the waste in any state with delisting authorization, IBM must obtain a delisting authorization from that state before it can manage

the waste as non-hazardous in that state.

## **VI. Statutory and Executive Order Reviews**

Under Executive Order 12866, "Regulatory Planning and Review " (58 FR 51735, October 4, 1993), this rule is not of general applicability and therefore, is not a regulatory action subject to review by the Office of Management and Budget (OMB). This rule does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) because it applies to a particular facility only. Because this rule is of particular applicability relating to a particular facility, it is not subject to the regulatory flexibility provisions of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), or to §§ 202, 204, and 205 of the Unfunded Mandates Reform Act of 1995 (UMRA) (Pub. L. 104-4). Because this rule will affect only a particular facility, it will not significantly or uniquely affect small governments, as specified in § 203 of UMRA. Because this rule will affect only a particular facility, this proposed rule does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the

distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132, "Federalism", (64 FR 43255, August 10, 1999). Thus, Executive Order 13132 does not apply to this rule.

Similarly, because this rule will affect only a particular facility, this proposed rule does not have tribal implications, as specified in Executive Order 13175, "Consultation and Coordination with Indian Tribal Governments" (65 FR 67249, November 9, 2000). Thus, Executive Order 13175 does not apply to this rule. This rule also is not subject to Executive Order 13045, "Protection of Children from Environmental Health Risks and Safety Risks" (62 FR 19885, April 23, 1997), because it is not economically significant as defined in Executive Order 12866, and because the Agency does not have reason to believe the environmental health or safety risks addressed by this action present a disproportionate risk to children. The basis for this belief is that the Agency used DRAS, which considers health and safety risks to children, to calculate the maximum allowable concentrations for this rule. This rule is not subject to Executive Order 13211, "Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use" (66 FR 28355 (May 22, 2001)), because it is not a significant regulatory action

under Executive Order 12866. This rule does not involve technical standards; thus, the requirements of § 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) do not apply. As required by § 3 of Executive Order 12988, "Civil Justice Reform", (61 FR 4729, February 7, 1996), in issuing this rule, EPA has taken the necessary steps to eliminate drafting errors and ambiguity, minimize potential litigation, and provide a clear legal standard for affected conduct.

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report which includes a copy of the rule to each House of the Congress and to the Comptroller General of the United States. Section 804 exempts from § 801 the following types of rules: (1) rules of particular applicability; (2) rules relating to agency management or personnel; and (3) rules of agency organization, procedure, or practice that do not substantially affect the rights or obligations of non-agency parties (5 U.S.C. 804(3)). EPA is not required to submit a rule report regarding today's action under § 801 because this is a rule of particular applicability. Executive Order (EO) 12898 (59 FR 7629 (Feb. 16, 1994)) establishes Federal

executive policy on environmental justice. Its main provision directs Federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States.

EPA has determined that this proposed rule will not have disproportionately high and adverse human health or environmental effects on minority or low-income populations because it does not affect the level of protection provided to human health or the environment. The Agency's risk assessment did not identify risks from management of this material in a Subtitle D landfill. Therefore, EPA believes that any populations in proximity of the landfills used by this facility should not be adversely affected by common waste management practices for this delisted waste.

#### **List of Subjects in 40 CFR Part 261**

Environmental protection, Hazardous waste, Recycling, Reporting and recordkeeping requirements.



Authority: § 3001(f) RCRA, 42 U.S.C. § 6921(f).

Date: June 20, 2012

**H. Curtis Spalding,**  
Regional Administrator, EPA Region 1

For the reasons set out in the preamble, EPA proposes to amend 40 CFR part 261 as follows:

**PART 261--IDENTIFICATION AND LISTING OF HAZARDOUS WASTE**

1. The authority citation for part 261 continues to read as follows:

**Authority:** 42 U.S.C. 6905, 6912(a), 6921, 6922, 6924(y) and 6938.

2. Amend Table 1 of Appendix IX to part 261 by adding the following waste stream in alphabetical order by facility "IBM Corporation" to read as follows:

**Appendix IX to part 261--Wastes Excluded Under §§ 260.20 and 260.22.**

Table 1--Wastes Excluded From Non-Specific Sources

Facility	Address	Waste description		
*	*	*	*	*
IBM Corporation	Essex Junction, VT	Wastewater Treatment Sludge (Hazardous Waste No. F006) generated at a maximum annual rate of 3,150 cubic yards per calendar year and disposed of in a Subtitle D Landfill		

which is licensed, permitted, or otherwise authorized by a state to accept the delisted wastewater treatment sludge.

IBM must implement a testing program that meets the following conditions for the exclusion to be valid:

1. Delisting Levels: All leachable concentrations for the following constituents must not exceed the following levels (mg/L for TCLP): Arsenic - 5.0; Barium - 100.0; Cadmium - 1.0; Chromium - 5.0; Lead - 5.0; Mercury 0.2; and, Nickel - 32.4.

2. Waste Handling and Holding: (A) IBM must manage as hazardous all WWTP sludge generated until it has completed initial verification testing described in paragraph (3) (A) and valid analyses show that paragraph (1) is satisfied and written approval is received by EPA. (B) Levels of constituents measured in the samples of the WWTP sludge that do not exceed the levels set forth in paragraph (1) for two consecutive quarterly sampling events are non-hazardous. After approval is received from EPA, IBM can manage and dispose of the non-hazardous WWTP sludge according to all applicable solid waste regulations. (C) Notwithstanding having received the initial approval from EPA, if constituent levels in a later sample exceed any of the Delisting Levels set in paragraph (1), from that point forward, IBM must treat all the waste covered by this exclusion as hazardous until it is demonstrated that the waste again meets the levels in paragraph (1). IBM must manage and dispose of the waste generated under Subtitle C of RCRA from the time that it becomes aware

of any exceedance.

3. Verification Testing Requirements: IBM must perform sample collection and analyses in accordance with the approved Quality Assurance Project Plan dated January 27, 2011. All samples shall be representative composite samples according to appropriate methods. As applicable to the method-defined parameters of concern, analyses requiring the use of SW-846 methods incorporated by reference in 40 CFR 260.11 must be used without substitution. As applicable, the SW-846 methods might include Methods 0010, 0011, 0020, 0023A, 0030, 0031, 0040, 0050, 0051, 0060, 0061, 1010A, 1020B, 1110A, 1310B, 1311, 1312, 1320, 1330A, 9010C, 9012B, 9040C, 9045D, 9060A, 9070A (uses EPA Method 1664, Rev. A), 9071B, and 9095B. Methods must meet Performance Based Measurement System Criteria in which the Data Quality Objectives are to demonstrate that samples of the IBM sludge are representative for all constituents listed in paragraph (1). To verify that the waste does not exceed the specified delisting concentrations, for one year after the final exclusion is granted, IBM must perform quarterly analytical testing by sampling and analyzing the WWTP sludge as follows: (A) Quarterly Testing: (i) Collect two representative composite samples of the WWTP sludge at quarterly intervals after EPA grants the final exclusion. The first composite samples must be taken within 30 days after EPA grants the final approval. The second set of samples must be taken at least 30 days after the first set. (ii) Analyze

the samples for all constituents listed in paragraph (1). Any waste regarding which a composite sample is taken that exceeds the delisting levels listed in paragraph (1) for the sludge must be disposed as hazardous waste in accordance with the applicable hazardous waste requirements from the time that IBM becomes aware of any exceedance.

(iii) Within thirty (30) days after taking each quarterly sample, IBM will report its analytical test data to EPA. If levels of constituents measured in the samples of the sludge do not exceed the levels set forth in paragraph (1) of this exclusion for two consecutive quarters, and EPA concurs with those findings, IBM can manage and dispose the non-hazardous sludge according to all applicable solid waste regulations. (B)

Annual Testing: (i) If IBM completes the quarterly testing specified in paragraph (3) above and no sample contains a constituent at a level which exceeds the limits set forth in paragraph (1), IBM may begin annual testing as follows: IBM must test two representative composite samples of the wastewater treatment sludge (following the same protocols as specified for quarterly sampling, above) for all constituents listed in paragraph (1) at least once per calendar year. (ii) The samples for the annual testing taken for the second and subsequent annual testing events shall be taken within the same calendar month as the first annual sample taken. (iii) IBM shall submit an annual testing report to EPA with its annual test results, within thirty (30) days after taking each annual sample.

The annual testing report also shall include the total amount of waste in cubic yards disposed during the calendar year.

4. Changes in Operating Conditions: If IBM significantly changes the manufacturing or treatment process described in the petition, or the chemicals used in the manufacturing or treatment process, it must notify the EPA in writing and may no longer handle the wastes generated from the new process as non-hazardous unless and until the wastes are shown to meet the delisting levels set in paragraph(1), IBM demonstrates that no new hazardous constituents listed in appendix VIII of part 261 have been introduced, and IBM has received written approval from EPA to manage the wastes from the new process under this exclusion. While the EPA may provide written approval of certain changes, if there are changes that the EPA determines are highly significant, the EPA may instead require IBM to file a new delisting petition.

5. Data Submittals and Recordkeeping: IBM must submit the information described below. If IBM fails to submit the required data within the specified time or maintain the required records on-site for the specified time, EPA, at its discretion, will consider this sufficient basis to reopen the exclusion as described in paragraph (6). IBM must: (A) Submit the data obtained through paragraph (3) to the Chief, RCRA Waste Management & UST Section, U.S. EPA Region 1, (OSRR07-1), 5 Post Office Square, Suite 100, Boston, MA 02109-3912, within the time specified. All supporting data can be submitted on CD-ROM or

some comparable electronic media; (B) Compile, summarize, and maintain on site for a minimum of five years and make available for inspection records of operating conditions, including monthly and annual volumes of WWTP sludge generated, analytical data, including quality control information and, copies of the notification(s) required in paragraph (7); (C) Submit with all data a signed copy of the certification statement in 40 CFR 260.22(i)(12).

6. Reopener Language: (A) If, anytime after disposal of the delisted waste, IBM possesses or is otherwise made aware of any environmental data (including but not limited to leachate data or groundwater monitoring data) or any other relevant data to the delisted waste indicating that any constituent is at a concentration in the leachate higher than the specified delisting concentration, then IBM must report such data, in writing, to the Regional Administrator and to the Vermont Agency of Natural Resources Secretary within 10 days of first possessing or being made aware of that data. (B) Based on the information described in paragraph (A) and any other information received from any source, the Regional Administrator will make a preliminary determination as to whether the reported information requires Agency action to protect human health or the environment. Further action may include suspending, or revoking the exclusion, or other appropriate response necessary to protect human health and the environment. (C) If the Regional

Administrator determines that the reported information does require Agency action, the Regional Administrator will notify IBM in writing of the actions the Regional Administrator believes are necessary to protect human health and the environment. The notice shall include a statement of the proposed action and a statement providing IBM with an opportunity to present information as to why the proposed Agency action is not necessary or to suggest an alternative action. IBM shall have 30 days from the date of the Regional Administrator's notice to present the information. (D) If after 30 days IBM presents no further information or after a review of any submitted information, the Regional Administrator will issue a final written determination describing the Agency actions that are necessary to protect human health or the environment. Any required action described in the Regional Administrator's determination shall become effective immediately, unless the Regional Administrator provides otherwise.

7. Notification Requirements: IBM must do the following before transporting the delisted waste: (A) Provide a one-time written notification to any state Regulatory Agency to which or through which it will transport the delisted waste described above for disposal, 60 days before beginning such activities. (B) Update the one-time written notification if it ships the delisted waste into a different disposal facility. Failure to provide this notification will result in a violation of the delisting petition and a



possible revocation of the decision.

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